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CIVIL JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN EUROPE*

AT LAST: THE EC COURT OF JUSTICE ON *FORUM NON CONVENIENS*

by F. Ibili**

1. INTRODUCTION

Forum non conveniens is a well known doctrine in common law jurisdictions, such as the United States of America and the United Kingdom. This doctrine provides the court with a broad discretionary power to consider whether it is appropriate to exercise jurisdiction conferred upon it. A basic requirement is the existence of an adequate alternative forum abroad,[1] which is more appropriate for trial of the action under the circumstances of the case. European civil law jurisdictions are often unfamiliar with the doctrine of *forum non conveniens*, at least in civil and commercial matters.[2]

As international civil litigation is rapidly increasing in our global world, the

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* Last survey in this Review: (2005) pp. 109 et seq.

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1. See, e.g., for the United States of America, M. Waples, 'The Adequate Alternative Forum Analysis in Forum Non Conveniens: A Case for Reform', 36 *Connecticut L Rev.* (2004) pp. 1475-1518. Cf., R.T. Bergsieker, 'International Tribunals and Forum Non Conveniens Analysis', 114 *Yale LJ* (2004) pp. 443-450.

2. However, this might be different in the field of procedural law with respect to family matters. See, e.g., Council Regulation 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, *OJ* 2003 L 338, p. 1, also referred to as 'Brussels IIA'. Art. 15 Brussels IIA provides for a *forum non conveniens*-discretion, which permits the courts of a Member State having jurisdiction as to the substance of the matter to refer the case to the courts of another Member State where this is in the best interest of the child. See on Brussels IIA, M.T. Rauscher, 'Parental Responsibility under the New Council Regulation "Brussels IIA"', 5 *The European Legal Forum* (2005) pp. 37-45. Further, Th.M. de Boer, 'Jurisdiction and Enforcement in International Family Law: A Labyrinth of European and International Legislation', 49 *NILR* (2002) pp. 326 et seq. Art. 15 Brussels IIA is derived from Arts. 8-9 of the Hague Convention of 19 October 1996 on Jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

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role of *forum non conveniens* as a jurisdiction-challenging mechanism becomes more important. The enormous amount of academic literature, mainly in the United States of America and England and to a lesser degree in continental Europe, also demonstrates this.[3] What strikes one most in American literature is the growing call for redefining *forum non conveniens* as expressed by the Supreme Court in *Gulf Oil* v. *Gilbert*[4] and *Piper Aircraft* v. *Reyno*.[5,6] One repeating theme in European literature is the question as to the compatibility of the English *forum non conveniens* doctrine with the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (as amended) (hereinafter: 'the Brussels Convention'),[7] especially if the more appropriate forum is not in another Member State but in a non-Member State.[8] At last, this controversial point seems to be settled for once and for all, since on 1 March 2005 the Court of Justice of the European Communities (hereinafter: 'EC Court of Justice') rendered a preliminary ruling in Case C-281/02, *Owusu* v. *Jackson*,[9] addressing this long-standing question.

As mentioned in the previous survey, the Brussels Convention is superseded by the Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (hereinafter: 'the Brussels Regulation').[10] On 1 March 2002 the

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3. The most recent comprehensive studies are: M. Karayanni, *Forum Non Conveniens in the Modern Age* (Ardsley, NY, Transnational Publishers 2004); A. Nuyts, *L'exception de forum non conveniens* (Brussels, Bruylant 2003).

4. 330 *US* 501 (1947).

5. 454 *US* 235 (1981).

6. E.g., J.R. Wilson, 'Coming to America to File Suit: Foreign Plaintiffs and the Forum Non Conveniens Barrier in Transnational Litigation', 65 *Ohio State LJ* (2004) pp. 659-695; Waples, loc. cit. n. 1; M. Davies, 'Time to Change the Federal Forum Non Conveniens Analysis', 77 *Tulane L Rev.* (2002) pp. 309-386. Cf., H. Zhenjie, 'Forum Non Conveniens: An Unjustified Doctrine', 48 *NILR* (2001) pp. 143-169.

7. For the United Kingdom the Brussels Convention, as amended by the 1978 Accession Convention, entered into force on 1 January 1987, shortly before the House of Lords rendered its judgment in *Spiliada Maritime* v. *Cansulex*, [1987] *AC* 460, 476: 'The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice.'

8. In this respect Section 49 of the English Civil Jurisdiction and Judgments Act 1982 provides: 'Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention.' See on this Act, e.g., P.A. Stone, 'The Civil Jurisdiction and Judgments Act 1982: Some Comments', 32 *ICLQ* (1983) pp. 477-499.

9. Not yet published in *ECR*. See *OJ* 2005 C 106, p. 2. The preliminary ruling is available at <www.curia.eu.int>.

10. *OJ* 2001 L 12, p. 1.

Brussels Regulation came into force for all Member States of the European Union, with the exception of Denmark. As from 1 May 2004 the Regulation also operates for the new Member States of the European Union.[11] The case-law of the EC Court of Justice with regard to the Brussels Convention, including the ruling in *Owusu*, will remain relevant under the provisions of the Brussels Regulation.

This note discusses the preliminary ruling of the EC Court of Justice in *Owusu*, which is important for all parties which are (to be) involved in international civil litigation in Europe. After *Owusu* the international plaintiff can be sure that no court of any Member State can rely on *forum non conveniens* or whatever doctrine to refuse the exercise of its jurisdiction, once this jurisdiction is based on the Brussels Convention or the Brussels Regulation.

2. THE FACTS IN *OWUSU*

On 10 October 1997 Andrew Owusu, a British national domiciled in the United Kingdom, suffered a very serious accident during his holiday in Jamaica. In the late afternoon when no lifeguards were present, Owusu decided to dive into the sea. Sadly, Owusu hereby hit his head against a submerged sandbank. This resulted in a fracture of his fifth cervical vertebra, which rendered him tetraplegic. Only after this accident a sign 'No Diving Shallow Water' was put.[12]

In 2000 Owusu brought an action in the United Kingdom for breach of contract against Nugent B. Jackson, who is also domiciled in the United Kingdom, from whom he rented a two-bedroomed holiday villa at Mammee Bay in Jamaica. The contract provided that Owusu would have access to a private beach. He alleged that it also included an implied term that the beach would be safe and free from hidden dangers. In addition, an action in tort was brought in English court against several Jamaican companies. It is alleged that they, in their capacity as owner, occupier or manager of the relevant beach, failed to alert swimmers to the dangers of the shallow water.[13] The legal dispute between Owusu and the defendants had only connecting factors with the United

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11. Those are: Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Czech Republic, Malta and (Greek) Cyprus.

12. *Owusu* v. *Jackson*, [2002] *EWCA Civ* 877, at para. 18: 'His [the manager of the Enchanted Garden Hotel, FI] company did not believe they were under any obligation to erect the sign, because it was self-evident that persons should not dive into shallow water, but they were becoming exasperated with the stupidity of people who wanted to dive into the water. He did not know of any other hotels that had signs on their beach warning swimmers about the dangers of diving into shallow water, as the dangers were self-evident.'

13. It turned out that a similar accident occurred two years earlier, in which another English holiday-maker (Alexandra Rickham) was involved. She brought an action for damages in Jamaican courts. Ibid., at para. 7.

Kingdom and Jamaica. No other Member State of the European Union was involved, so the competing jurisdictions were England and Jamaica.

All the summoned defendants challenged the jurisdiction of the English court. They applied for a stay of proceedings under Rule 11.1 of the Civil Procedure Rules,[14] arguing that the action had the most real and substantial connection with Jamaica (e.g., the relevant events occurred in Jamaica, Jamaican law would probably govern the actions and most of the witnesses were resident in Jamaica).[15] The defendants claimed that Jamaica was clearly a more appropriate forum for trial than England, in which the case might be tried more suitable for the interests of all the parties and the ends of justice.[16]

The English court in first instance, in the person of Judge Bentley sitting as Deputy High Court Judge in Sheffield, based its jurisdiction in respect of Jackson on Article 2 of the Brussels Convention. Article 2, which should be considered as the fundamental principle of the Brussels Convention, provides for jurisdiction to the courts of the Member State in which the defendant has its domicile or seat. Judge Bentley took the view that he was not entitled to stay the action on the ground of *forum non conveniens*, since Jackson was domiciled in the United Kingdom. For this, he relied upon the principles laid down in the preliminary ruling of the EC Court of Justice in *Group Josi* v. *Universal Insurance.*[17] The Brussels Convention did not apply to the Jamaican defendants because they were not domiciled in a Member State.[18] Although *forum non*

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14. This Rule reads: 'A defendant who wishes to (a) dispute the court's jurisdiction to try the claim; or (b) argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.'

15. As regards the residence of witnesses, Owusu's solicitor put forward that two of his client's witnesses (Owusu himself and Rickham) had suffered significant injuries and it would be difficult for them to travel to Jamaica (*Owusu* v. *Jackson*, [2002] *EWCA Civ* 877, at para. 16).

16. It is obvious that the Jamaican defendants had interests in having the trial in their home forum, but why did Jackson applied for *forum non conveniens*? However, he was domiciled in the United Kingdom. Jackson's insurance, just like the Jamaican's, did not cover compensation for damages in respect of judgments obtained in other proceedings than before a Jamaican court (ibid., at para. 15).

17. Case C-412/98, [2000] *ECR* I-5925, *NILR* 2002 106. The EC Court of Justice did not rule on *forum non conveniens*, but only held: 'Title II of the Brussels Convention (as amended) is in principle applicable where the defendant has its domicile or seat in a Contracting State, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of that convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a Contracting State.' In some comments it is argued that this ruling implicitly precludes the use of *forum non conveniens* within the Brussels Convention. See, e.g., C.D. Bougon, 'Time to Revisit Forum Non Conveniens in the UK? Group Josi Reinsurance Co v UGIC', 32 *Victoria U Wellington L Rev.* (2001) pp. 705-713.

18. Cf., Art. 4 Brussels Convention: 'If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall … be determined by the law of that Contracting State.'

conveniens could be applied Judge Bentley neither granted a stay of proceedings in their respect. Otherwise it was possible that two courts of different states would try the same factual issue upon the same or similar evidence, with the risk of reaching different conclusions.

The defendants appealed against this judgment in the Court of Appeal (England and Wales) Civil Division. On appeal, the central issue was whether the court of a Member State which relied its jurisdiction on the Brussels Convention, is entitled to declare itself *forum non conveniens* in favor of the court of a non-Member State, when the defendant is domiciled in a Member State and the case has no connecting factors but only to one Member State and a non-Member State. Since this question is not a matter on which the EC Court of Justice has ever given a ruling, the Court of Appeal decided to refer, in accordance with Article 2(2) of the 1971 Protocol to the Brussels Convention, the following questions to the EC Court of Justice:[19]

> '1. Is it inconsistent with the Brussels Convention …, where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:
> (a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;
> (b) if the proceedings have no connecting factors to any other Contracting State?
> 2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?'

3. THE PRELIMINARY RULING OF THE EC COURT OF JUSTICE

The Court of Appeal made its reference to the EC Court of Justice at 5 July 2002 and called upon the Court to accelerate its preliminary ruling given the grievously injuries of Owusu. Nevertheless, Advocate General Léger delivered his elaborated opinion not until 14 December 2004, while the preliminary ruling of the EC Court of Justice followed only two and a half months later on 1 March 2005.[20]

Before addressing the question as to the consistency of the doctrine of *forum non conveniens* with the Brussels Convention, the EC Court of Justice deter-

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19. *OJ* 2002 C 233, p. 16.

20. Averagely, a preliminary ruling of the EC Court of Justice is delivered within 23 months after reference (European Court of Justice, Press Release No. 13/05, 18 February 2005, available at <www.curia.eu.int/nl/actu/communiques/cp05/info/cp050013nl.pdf>, last visited 21 July 2005).

mines whether Article 2 of this Convention is at all applicable in circumstances such as in the main proceedings, that is to say, where the plaintiff (Owusu) and one of the defendants (Jackson) are domiciled in the same Member State (United Kingdom) and the case between them has certain connecting factors with a non-Member State (Jamaica), but not with another Member State.

It is clear from the Jenard Explanatory Report[21] that the existence of an international element is a prerequisite for the application of the Brussels Convention. But how should this requirement be interpreted? Should there be a legal relationship involving at least two Member States? Or is it sufficient when there exists relevant contacts with only one Member State and another non-Member State? According to the EC Court of Justice nothing in the wording of Article 2 Brussels Convention suggests that the application of this Article is subject to the condition that there should be a legal relationship involving at least two Member States.[22] The involvement of a Member State and a non-Member State, either because of the subject-matter of the proceedings or the domiciles of the parties, also makes the case international.[23] It follows that Article 2 applies to circumstances such as in the main proceedings, involving relationships between the courts of a single Member State (the domicile of the plaintiff and one of the defendants) and those of a non-Member State (the occurrence of the accident).[24]

Now the Brussels Convention applies, the question can be addressed whether this Convention leaves any room for the English court, which derived jurisdiction from Article 2, to stay proceedings on the ground that a court of a non-Member State is a more appropriate forum for trial, when the jurisdiction of no other Member State is in issue or the proceedings have no connecting factors to any other Member State. The EC Court of Justice, just like the Advocate General, clearly held that the doctrine of *forum non conveniens* is not compatible at all with the framework of the Brussels Convention. That is also true even when the alternative forum can be situated in a non-Member State and the proceedings have only connecting factors to one Member State and another

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21. *OJ* 1979 C 59, pp. 1, 8.

22. Case C-281/02, *Owusu* v. *Jackson*, at para. 24.

23. Ibid., at para. 26. The EC Court of Justice (at paras. 28-29) points out that also a number of other jurisdiction rules of the Brussels Convention are applicable in circumstances in which the relationship involves only one Member State and one or more non-Member States, such as is the case in Art. 16, para. 1 (immovable property) and Art. 17 (choice of forum clause). In Case C-412/98, *Group Josi* v. *Universal Insurance*, [2000] *ECR* I-5925, at para. 44, the EC Court of Justice even ruled that under Art. 18 of the Brussels Convention, the voluntary appearance of the defendant establishes the jurisdiction of a court of a Member State before which the plaintiff has brought proceedings, without the place of the defendant's domicile being relevant.

24. It is remarkable that the Advocate General spends a large part of his opinion to the requirement of internationality (paras. 83-216), whereas the question as to the compatibility of *forum non conveniens* with the Brussels Convention forms a minor part of his opinion (paras. 217-280). See further on this requirement, C.A. Heinze and A. Dutta, 'Ungeschriebene Grenzen für europäische Zuständigkeiten bei Streitigkeiten mit Drittstaatenbezug', 25 *IPRax* (2005) pp. 224-229.

non-Member State.[25] The EC Court of Justice relies upon the following arguments.

(1) First of all, the general jurisdiction rule in Article 2 Brussels Convention is mandatory in nature.[26] Once the court has jurisdiction by virtue of this article, it is not only entitled but also obliged to accept and exercise this jurisdiction. According to the terms of Article 2 there can be no derogation from this basic jurisdiction rule, except in the cases expressly envisaged by the Convention. It is obvious that the Brussels Convention does not provide for an exception on the basis of *forum non conveniens*, by which could be derogated from Article 2.[27]

(2) The principle of legal certainty is one of the important objectives of the Brussels Convention.[28] This principle would not be fully guaranteed if the courts having jurisdiction under the Convention were to be allowed to apply the doctrine of *forum non conveniens*. The Brussels Convention is intended to strengthen the legal protection of persons established in the European Community, by providing uniform rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the national courts of the Member States.[29]

(3) Allowing a *forum non conveniens* exception would disable the defendant to reasonably foresee before which other court than those of the state in which he is domiciled, he could be sued.[30] Also, it would thwart the plaintiff in his proceedings, as it is up to him to demonstrate that he will possibly not obtain justice in the alternative forum, or that the foreign court has no jurisdiction, or he does not have access to effective justice before that court.[31] Shortly, the legal

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25. Case C-281/02, *Owusu* v. *Jackson*, at para. 46.

26. Ibid., at para. 37.

27. Ibid. The defendants emphasized the negative consequences which would result in practice from the obligation the English courts would then be under to try this case, as regards for example the logistical difficulties resulting from the geographical distance, the need to assess the merits of the case according to Jamaican law and the enforceability in Jamaica of a judgment (at para. 44). The EC Court of Justice (at para. 45) merely held that, genuine as those difficulties may be, those difficulties are not such as to call into question the mandatory nature of the general jurisdiction rule in Art. 2.

28. Cf., 11th Recital in the Preamble of the Brussels Regulation: 'The rules of jurisdiction must be highly predictable …'

29. Case C-281/02, *Owusu* v. *Jackson*, at paras. 38-41. It is established case-law of the EC Court of Justice that the principle of legal certainty requires that the jurisdiction rules which derogate from Art. 2 should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the state in which he is domiciled, he may be sued. See Case C-412/98, *Group Josi* v. *Universal Insurance*, [2000] *ECR* I-5925, at para. 24; Case C-256/00, *Besix* v. *WABAG/Plafog*, [2002] *ECR* I-1699, at para. 26 (*NILR* 2005 114).

30. In literature this argument has been criticized, since it is the defendant himself who applies for a *forum non conveniens*-stay. See, e.g., T.C. Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws', 54 *ICLQ* (2005) p. 827.

31. Case C-281/02, *Owusu* v. *Jackson*, at para. 42. However, common law shows that such

protection of persons established in the European Community would be undermined by applying the doctrine of *forum non conveniens*.

(4) If the appeal for a stay of proceedings on the ground of *forum non conveniens* is successful, the possibility left for the plaintiff is to commence a new suit in the alternative forum abroad. Bringing the case before the alternative forum results in extra expenses and in the extension of the period of procedure.[32]

(5) Finally, the use of the *forum non conveniens* doctrine is undesirable because allowing it would affect the uniform application of the jurisdiction rules of the Brussels Convention: *forum non conveniens* is only recognized in a limited number of Member States (actually only in the United Kingdom and Ireland). The possibility should be excluded that by the use of *forum non conveniens* different results appear in different Member States, depending on whether or not the national rules of each Member State include a *forum non conveniens* possibility.[33]

As far as the first question concerns, the EC Court of Justice held that:

> '… the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.'[34]

If *forum non conveniens* is held inconsistent with the Brussels Convention, the Court of Appeal wants to know whether it is inconsistent in all cases or only in certain circumstances. This second question refers to the possibility of using *forum non conveniens* in circumstances in which there are identical or related proceedings pending before a court of a non-Member State, there is a party-agreement granting jurisdiction to the court(s) of a non-Member State, or there is a connection with a non-Member State of the same type as those referred to in Article 16 Brussels Convention (i.e., exclusive jurisdiction based on for example the location of immovable property). Since none of these

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problems might be resolved in a relatively easy way, namely by conditioning the *forum non conveniens* dismissal on, e.g., the defendants consent to the jurisdiction of the alternative forum, the defendants agreement to produce witnesses and documents in the alternative forum and the defendants waiver of appealing statute of limitation in the alternative forum. See, e.g., J. Bies, 'Conditioning Forum Non Conveniens', 67 *U Chi. L Rev.* (2000) pp. 489-519.

32. Case C-281/02, *Owusu* v. *Jackson*, at para. 42. Cf., Advocate General, at para. 270: 'It goes without saying that those steps have a cost and are likely considerably to prolong the time spent in the conduct of proceedings before the claimant finally has his case heard. Moreover, in that respect, the mechanism associated with the *forum non conveniens* doctrine could be regarded as incompatible with the requirements of Article 6 of the European Convention on the protection of human rights and fundamental freedoms.'

33. Case C-281/02, *Owusu* v. *Jackson*, at para. 43.

34. Ibid., at para. 46.

circumstances is present in the main proceedings, the second question is purely hypothetical. For this reason the EC Court of Justice, following the Advocate General,[35] feels no need to answer it.[36]

4. NOTE[37]

Undoubtedly, it has always been clear that the court of a Member State, having jurisdiction by virtue of the Brussels Convention, in no case has the power to declare itself *forum non conveniens* in favor of the court of another Member State. The Brussels Convention is in essence inspired by the civil law systems, which generally are unfamiliar with the doctrine of *forum non conveniens*.[38] *Forum non conveniens* is considered as an unwelcome discretionary power which conflicts with the principle of legal certainty. During negotiations for the accession of the United Kingdom and Ireland to the Brussels Convention the question raised whether any amendments in the field of *forum non conveniens* would be necessary to the Convention. Eventually, no such amendments were made.[39] In general the Convention itself already provides for fora which guarantee a substantial link between forum and dispute, so a correction by means of *forum non conveniens* is redundant.

It is also undisputed that the internal rule of *forum non conveniens* in the United Kingdom can be invoked where the Brussels Convention is not applicable, i.e., if the case falls outside the scope of the Convention. The Brussels

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35. Advocate General Léger, opinion, paras. 69-81.

36. Case C-281/02, *Owusu* v. *Jackson*, at paras. 47-52.

37. See on this preliminary ruling also: A. Briggs, 'The Death of Harrods: *Forum Non Conveniens* and the European Court', 121 *LQR* (2005) pp. 535-540; J. Harris, 'Stays of Proceedings and the Brussels Convention', 54 *ICLQ* (2005) pp. 933-950; G. Cuniberti, 'Forum Non Conveniens and the Brussels Convention', 54 *ICLQ* (2005) pp. 973-982; R. Fentiman, 'English Domicile and the Staying of Actions', 64 *Cambridge LJ* (2005) pp. 303-304; A. Bruns, 60 *Juristen Zeitung* (2005) pp. 887-892; J. Fawcett, 'Common Law Practices and the Brussels Convention', 4 *Revue@dipr.be* (2005) pp. 103-110; G. Cuniberti and M.M. Winkler, 132 *Clunet* (2005) pp. 1177-1191; Heinze and Dutta, loc. cit. n. 24. Cf., C. Thiele, 'Forum non conveniens im Lichte europäischen Gemeinschaftsrechts', 48 *RIW* (2002) pp. 696-700.

38. None of the original six Member States – Belgium, France, Germany, Italy, Luxembourg and The Netherlands – recognized the *forum non conveniens* doctrine in civil and commercial matters. However, from 1 January 1970 till 1 January 2002 the Dutch Code of Civil Procedure contained a general provision on *forum non conveniens* for petition cases, i.e., mainly family law matters. See J.P. Verheul, 'The Forum (Non) Conveniens in English and Dutch Law and Under Some International Conventions', 35 *ICLQ* (1986) pp. 416-419. As from 1 January 2002 the application of this general rule is cut back to cases of parental responsibility in divorce cases.

39. See Schlosser Explanatory Report, *OJ* 1979 C 59, p. 71 at pp. 76-78. Since the Brussels Convention made inoperative exorbitant grounds for jurisdiction in national law of the United Kingdom (such as 'tag jurisdiction') towards defendants who are domiciled in a Member State (Art. 3 Brussels Convention), there was no need for correcting such exorbitant jurisdiction rules by *forum non conveniens*.

Convention only applies to civil and commercial maters, excluding, e.g., family law, tax law and administrative law. In addition, principally the defendant must have his domicile or place of business in a Member State. If one of these conditions is not met, the English court may declare itself *forum non conveniens* in favor of an alternative forum in a Member State or in a non-Member State.[40] Also, the courts of one part of the United Kingdom upheld the power to transfer the case on *forum non conveniens* grounds to the courts of another part of the United Kingdom.[41]

However, there has always been difference of opinion as to the question whether the court of a Member State, which has jurisdiction by virtue of the Brussels Convention, has the power to declare itself *forum non conveniens* when the alternative forum is in a non-Member State (e.g., a court in the United States of America).[42] In academic literature this question has been answered in different ways, varying from abandoning *forum non conveniens* in any case to allowing a limited use of the doctrine under certain conditions. According to one opinion, it should be possible for a court of a Member State to decline to exercise its jurisdiction derived from Article 2, when the more appropriate forum is in a non-Member State and no other Member State is involved.[43] This opinion is based on the presumption that the Brussels Convention is merely an agreement between the Member States, which was intended to regulate jurisdiction as between the courts of Member States but not as between the courts of Member States and non-Member States. The Court of Appeal accepted this view in *Re Harrods (Buenos Aires) Ltd*.[44] Although the House of Lords made a reference to the EC Court of Justice in this case,[45] no preliminary ruling was

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40. Cf., Fawcett, loc. cit. n. 37, at p. 109, arguing that this is unclear if the matter is within the material scope of the Brussels Convention and the more appropriate forum is in a Member State.

41. See, e.g., *Neil Lennon* v. *Scottish Daily*, [2004] *EWHC* 359. This is comparable to the possibility of transfer of American state courts as mentioned in 28 USC section 1404(a): 'For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil litigation to any other district court or division where it might have been brought.'

42. See on this subject, e.g., M. Niegisch, *Die Doktrin forum non conveniens und das EuGVÜ im Vereinigten Königreich* (Aachen, Shaker Verlag 1996); P. Huber, *Die Englische forum-non-conveniens-Doktrin und ihre Anwendung im Rahmen des Europäischen Gerichtsstands- und Vollstreckungsübereinkommen* (Berlin, Duncker & Humblot 1994). See further, A.R. Schwartz, 'In Re Harrods Ltd: The Brussels Convention and the Proper Application of Forum Non Conveniens to Non Contracting States', 15 *Fordham ILJ* (1991/1992) pp. 174-206; R. Fentiman, 'Jurisdiction, Discretion and the Brussels Convention', 26 *Cornell ILJ* (1993) pp. 59-99.

43 See, e.g, L. Collins, 'Forum non conveniens and the Brussels Convention', 106 *LQR* (1990) pp. 538-539; P. Kaye, 'The EEC Judgments Convention and the Outer World: Goodbye to Forum Non Conveniens?', *J Bus. L* (1992) p. 74; T. Hartley, 'The Brussels Convention and Forum Non Conveniens', 17 *European L Rev.* (1992) pp. 554-555; Schwartz, loc. cit. n. 42, at pp. 196-205. Cf., G. Hogan, 'The Brussels Convention, Forum Non Conveniens and the Connecting Factors Problem', 20 *European L Rev.* (1995) pp. 471-493.

44. [1990] 4 *All ER* 334, CA.

45. Request from the House of Lords, 13 July 1992, Case C-314/92, *OJ* 1992 C 219, p. 5.

rendered as the parties settled their dispute timely.[46] The view of the Court of Appeal in *Re Harrods* has been followed in other English decisions.[47]

The view is now explicitly rejected by the EC Court of Justice in *Owusu*. Another prevailing opinion, mostly expressed by academics from civil law countries, triumphed: the availability of a discretion on the basis of *forum non conveniens* destroys the framework of the Brussels Convention and creates a lack of uniformity in the interpretation and implementation of the Convention.[48] Hence, in any event the doctrine of *forum non conveniens* is incompatible with the Brussels Convention. In general, academic literature welcomed the preliminary ruling in *Owusu*. However, critical remarks in particularly English literature did also appear.[49] From a European perspective this preliminary ruling is hardly surprising. One should bear in mind that European civil law countries deal in a very different way with the issue of jurisdiction than is the case in common law countries. Civil law gives great importance to the predictability of the rules on jurisdiction, whereas common law is much more flexible and decides on a case-by-case basis. Certainly, this makes the approach of the Brussels Convention rigid, but it results in a high predictable system of jurisdiction.[50] Allowing *forum non conveniens*, even in cases where the alternative forum is in a non-Member State, would affect this predictability of the Brussels Convention.[51]

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46. Deletion of Case C-314/92, *OJ* 1994 C 103, p. 9.

47. See, e.g., *Travelers Casualty* v. *Sun Life*, [2004] *EWHC* 1704; *American Motorists* v. *Cellstar*, [2002] *EWHC* 421; *Haji-Ioannou* v. *Frangos*, [1999] 2 *Lloyd's Rep.* 337 (CA).

48. See for example, P. North, et al., *Cheshire and North's Private International Law*, 13th edn. (London, Butterworths 1999) pp. 264-266; R. Geimer and R.A. Schütze, *Europäischen Zivilverfahrensrecht: Kommentar zur EuGVVO, EuEheVO, EuZustellungsVO, zum Lugano-Übereinkommen und zum nationalen Kompetenz- und Anerkennungsrecht*, 2nd edn. (Munich, Beck 2004) p. 110; H. Duintjer Tebbens, 'The English Court of Appeal in Re Harrods: An Unwelcome Interpretation of the Brussels Convention', in M. Sumampouw, et al., eds., *Law and Reality: Essays on National and International Procedural Law in Honor of Cornelis Carel Albert Voskuil* (Dordrecht, Nijhoff 1992) pp. 59-61. See for English case-law already in this sense, *Berisford* v. *New Hemshire*, [1990] 2 *QB* 631; *Arkwright Mutual* v. *Bryanston*, [1990] 2 *QB* 649.

49. See, e.g., Fentiman, loc. cit. n. 37, at p. 305; Hartley, loc. cit. n. 30, at pp. 824-828.

50. See for the influences of civil law on the Brussels Convention and Brussels Regulation, e.g., A. Gardella and L.G. Radicati Di Brozolo, 'Civil Law, Common Law and Market Integration: The EC Approach to Conflicts of Jurisdiction', 51 *AJCL* (2003) pp. 611-637. Ibid., at p. 612: 'Undisputedly the most obvious influence of the civil law system on the Regulation's jurisdictional rules lies in the predetermined, and basically inflexible, nature of the criteria governing the assumption, and the declining, of jurisdiction by the courts of the member state.'

51. The importance of the principle of legal certainty can also be demonstrated by the preliminary ruling in Case C-256/00, *Besix* v. *WABAG/Plafog*, [2002] *ECR* I-1699 in which the EC Court of Justice held Art. 5, para. 1 of the Brussels Convention to be inapplicable where the place of performance of the obligation in question can not be determined because it consists in an undertaking not to do something which is not subject to any geographical limit and therefore characterized by a multiplicity of places for its performances.

Does the preliminary ruling in *Owusu* sets an end to all aspects of the long-standing question as to the applicability of *forum non conveniens* within the Brussels Convention? In my opinion, certainly, the curtain finally fell for *forum non conveniens* in European civil procedural law. Once the case falls within the scope of the Brussels Convention, the jurisdiction provisions of the Convention have a mandatory effect, i.e., jurisdiction must be exercised. It is not relevant with how many Member States the case has connecting factors, as long as there is an international element involved. It is also not relevant on which provision of the Brussels Convention (i.e., the general rule in Art. 2 or one of the other special rules in Arts. 5 to 18) jurisdiction of the court of a Member State is exactly based. The Court of Appeal in *American Motorists* v. *Cellstar*[52] asked itself whether the Brussels Convention permits a stay of proceedings in favor of the court in Texas, whereas its jurisdiction was based on Article 15 Brussels Convention (consumer contracts). In light of *Owusu*, the answer to this question should be evident.

After *Owusu*, there is one interesting question with regard to third states that still remains open. What about the mandatory nature of Article 2 Brussels Convention, if for example the court of a non-Member State has been previously seized of the matter, which could give rise to a situation of *lis pendens*? What if the jurisdiction of the court of a non-Member State is designated by an agreement between the parties or derives from the location of immovable property? In my opinion it is fully justified to make in those cases an exception to the mandatory nature of Article 2. A contrary view expressing that the courts of the Member State in which the defendant is domiciled have to exercise its jurisdiction ignoring the choice of forum agreement by the parties, the location of the immovable property or the pending of the case in another forum, should be rejected as European jurisdictional egoism. The question arises on which grounds this exception should be made? One might uphold the view that the basis for such an exception can be found in the national rules of each Member State, including *forum non conveniens*. However, this might result in the same disadvantages as expressed by the EC Court of Justice in *Owusu*, namely the fact that certainty is not guaranteed, neither the uniform application of the Brussels Convention. An alternative is to give an analogous effect to the provisions of the Brussels Convention on *lis pendens*, choice of court and the location of immovable property. In this view, the court of a Member State which founded its jurisdiction on Article 2 Brussels Convention, has the

52. [2002] *EWHC* 421, at para. 50 (4 March 2003): 'If it is permissible under the Brussels Convention to stay Amico's proceedings against CUK, an English domiciled company, on the ground that the forum conveniens for them is Texas, I would uphold the Judge's order granting such a stay. But it is in issue whether the Brussels Convention permits such a stay. In order to resolve the issue … I would therefore order a reference on that question to the European Court …'

power to decline jurisdiction when one of these circumstances as to third states appears.[53]

There are many fundamental differences between common law and civil law with regard to the allocation of jurisdiction in international civil and commercial matters. One major difference seems to be lying in the importance of the predictability of jurisdiction rules. The EC Court of Justice held in *Owusu* that the principle of legal certainty is a keystone of the Brussels Convention which should not be affected by the use of the *forum non conveniens* doctrine. The consequence of this ruling for Owusu himself is that the English court can finally start with judging the dispute on its merits. Although the ruling does in essence not affect the jurisdictional position of the Jamaican defendants, probably proceedings will neither be stayed in their case, so that the whole dispute can be litigated in one forum.

It is not the first time, and possibly not the last, that the EC Court of Justice sidelines a procedural instrument of the common law. Not long ago, English anti-suit injunctions already met the same fate as *forum non conveniens*. The EC Court of Justice in *Turner* v. *Grovit*[54] held that the Brussels Convention precludes 'the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings'.[55] As a result, the EC Court of Justice continues to emphasize that the application of national procedural rules (e.g., *forum non conveniens*, anti-suit injunctions) may not impair the effectiveness of the Brussels Convention. Of course, this is also true for the Brussels Regulation.

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53. Cf., Fawcett, loc. cit. n. 37, at pp. 109-110.

54. Case C-159/02, not yet published in *ECR*. See *OJ* 2004 C 118, p. 21.

55. Ibid., at para. 31. See on this preliminary ruling, e.g., T. Kruger. 'The Anti-suit Injunction in the European Judicial Space: Turner v Grovit', 53 *ICLQ* (2004) pp. 1030-1040.